

INTRODUCTION

When prosecuting cases of child abuse and neglect, a prosecutor cannot lose sight of the fact that in addition to investigating and determining that a child has been abused, he must also convince twelve members of the jury that the defendant charged with the crime is responsible for the abuse. The twelve members who will decide the case will come from greatly divergent religious, racial, ethnic, economic, and educational backgrounds. They generally will have no knowledge of child abuse except for what they have seen reported in the media, depicted in fictional accounts on television, and in some cases, experienced in their own lives. They will hear the trial judge instruct them that they have to unanimously agree that the defendant is guilty beyond a reasonable doubt.

It is against this backdrop that all prosecutors operate. However, if one were to compare how the ten counties in New Hampshire respond to this challenge, one would observe that there are almost as many methods to investigate and prosecute child abuse cases as there are counties in the State. While no one method has been validated as the most effective to date, some counties share an approach which greatly enhances the likelihood of success at trial while lessening the adverse impact of the prosecution on the victim. Conversely, there are many methods which impede the likelihood of a successful prosecution.

The purpose of this section is to suggest a general approach to the investigation and prosecution of child abuse cases. It will also present an overview of the various tools available to the prosecutor, the legal issues inherent in any child abuse prosecution, and certain practical considerations when investigating a child abuse case and taking it to trial. It is not, however, intended as a definitive guide on how to investigate a child abuse case or how to prove a case once it reaches trial. Such a discussion is beyond the scope of this manual. Additionally, this section is not intended to educate professionals in other fields about the intricacies of a criminal prosecution. A working knowledge of the criminal justice system is presumed. It is hoped, however, that professionals from other fields will be able to use this information to gain a better understanding of the prosecutor's role.

GENERAL APPROACH

INTRODUCTION

The most effective approach to the investigation and prosecution of child abuse cases should minimally include the following components:

1. Experienced and specialized prosecutors
2. Experienced and specialized investigators
3. Vertical prosecutions - a single prosecutor assigned to the case from initial investigation through sentencing and post conviction

4. Joint Investigations, i.e., Cooperation between law enforcement, the Division of Children and Youth Services, and victim

5. Utilization of all available techniques and methods at one's disposal, including reliance upon professionals from other disciplines.

These five factors are listed simplistic, unfortunately, only a handful of counties in the State utilize such an approach. While it is recognized that many counties lack the resources to implement such an approach, this approach is recommended as one towards which all prosecutors should strive to achieve. Experience in some counties has demonstrated that much can be done with limited resources. Lack of commitment is a greater impediment than lack of resources.

EXPERIENCED AND SPECIALIZED PROSECUTORS

To ensure that child abuse cases are effectively prosecuted, the prosecutor responsible for them must receive specialized training; have hands-on experience; be well versed about both the legal and practical child abuse issues, and be temperamentally suited for the task. Some prosecutors believe that a good prosecutor is a good prosecutor regardless of the type of case assigned, Assuming that if one can effectively try a burglary, rape, or drug case, then he or she can do the same with child abuse cases. Such a belief ignores several facts.

One fact is that child abuse cases are among the hardest of all cases to try. Child abuse cases are almost unique in that the prosecutor must first prove that a crime even occurred. Unlike the average homicide, burglary, robbery, or drug case, the average child abuse case presents no physical evidence of the crime. Therefore, before the jury can conclude that the defendant is guilty, they first have to determine if the child was in fact abused. To compound the problem, the usual case will involve inconsistencies by the victim; delays in reporting the abuse; motives for fabrication; possible recantation; and a host of other problems unique to child abuse cases. Without experience in the field and in child abuse prosecution, it is very difficult to rely simply upon skills learned in prosecuting other types of cases.

Additionally, not every prosecutor has the temperament and demeanor to work effectively with the victims. Some individuals are just not adept at relating to children when it comes to a courtroom setting. Even those who relate well to children generally may be unable to do so when sexual acts of a very intimate nature are involved. Some prosecutors have great difficulty with these cases and feel uncomfortable and ill at ease. If the attorney's discomfort is sensed by the child or the jury, the effects can be disastrous.

EXPERIENCED AND SPECIALIZED INVESTIGATORS

Of equal, if not greater importance in child abuse prosecutions is utilization of the skills of an investigator experienced in investigating abuse and neglect cases. The investigation of child abuse cases may be the most important aspect of the criminal prosecution. Not only does the investigation determine who should be charged with the commission of a crime, it is the foundation upon which the outcome of the criminal prosecution depends. As with the prosecutor, a detective responsible for child abuse cases must receive specialized training; have hands-on experience; be familiar with child abuse legal issues and trial tactics; and be temperamentally suited for the job. Many of the factors discussed above apply here.

If a child abuse case is assigned to an investigator inexperienced in handling such cases, the question is not whether he will make a mistake but how many will be made. Child abuse cases are difficult to investigate. Many people, officers and social workers included, find it to be difficult and upsetting to see a toddler battered by parents or hear a young girl describe how her father performed cunnilingus and intercourse with her. Whereas a skilled investigator may get a very detailed account, an unskilled investigator may get nothing, perhaps because the officer is uncomfortable and the victim, picking up on that, reacted accordingly.

Furthermore, unless the investigator is experienced in the field, he will most likely close cases that should have been prosecuted. For instance, when confronted with a young girl stating that an adult male put his penis in her vagina, and yet the medical exam showing no evidence of penetration, the investigator may conclude that the victim is fabricating the abuse. A trained detective will recognize that her conception of the man putting his penis in her is in reality penile contact with the victim's labia. A similar situation might arise where a young boy discloses that he was sodomized by an adult male, describing how he, the child, "had his pants and underwear on" when this happened. An unskilled investigator would think he had no case. An experienced investigator would appreciate how literal a child can be and ask the follow-up question "where were your clothes?" The probable answer would be "around my ankles."

The investigator must also have a working knowledge of the legal issues inherent in child abuse cases. An investigation which fails to recognize the age and relationship components of RSA 632-A:2, X or to properly assess the child's competency is an inadequate investigation. It is also one that must be redone.

An experienced investigator's skills go beyond dealing with the child, but also towards relating to the family, the offender, and obtaining other specific types of information needed before the case can go to trial. Even with expertise in dealing with child abuse cases, these tasks are difficult. To expect an inexperienced investigator to handle these cases on rare occasions is a disservice to the officer, the victim, and the State's case.

VERTICAL PROSECUTION

Vertical prosecution is a concept which generally includes the assignment of a single prosecutor (and victim assistance worker) to track a case from initiation through post-conviction hearings. In some counties it also includes specialized units or teams to handle a specific type of case because the nature of the crime requires specific knowledge and expertise. Such units are found in some county prosecutors' offices and have countywide jurisdiction. Child abuse is a crime which needs to be handled in such a fashion. The Attorney General's Task Force on Child Abuse and Neglect, the Attorney General's Office, and the County Prosecutors Association have all strongly recommended the formation of specialized child abuse units in county prosecutors' offices throughout the State.

A specialized child abuse and neglect unit should be composed of both investigative and legal personnel. Obviously, the size of the jurisdiction dictates the size and budget of the unit. The role of the prosecutor in such a unit is multifaceted. He or she should be aware of all reports of abuse that come into the office, review the investigations as they develop and provide insight and guidance into what is needed. Once an investigation is complete, together with victim assistance, the prosecutor must then decide whether to present the case to the Grand Jury. After indictment, the assigned prosecutor takes the case to trial. Obviously, if the prosecutor's caseload is too large, other attorneys should be assigned to the unit to assist in investigation, supervision and trial work.

This approach resolves the issue of inexperienced assistant prosecutors and investigators handling child abuse cases. Anyone who is assigned to such a unit and survives, becomes skilled quickly. It is also cost effective for specialized personnel to receive the advanced education and training the assignment will require.

Another advantage of vertical or specialized prosecution is that, when trying or pleading a case, the advocate is intimately familiar with the file. The assigned prosecutor has an understanding of the investigation and issues that another attorney picking up the file would not have. The assigned prosecutor also benefits from the day-to-day assistance of the investigator and victim assistance worker who investigated the case from the outset. The victim assistance and the investigator are involved from the day the case is opened until a plea is entered or a verdict returned, and often continues through post conviction hearings and processes.

The assigned prosecutor further benefits from a specific crime-focused approach because he better understands the dynamics of a child abuse investigation. By working with the investigator and victim assistance, he knows what can be done and what cannot be done with a case. With the specialized knowledge of investigation and prosecuting such cases, applied to the knowledge of the facts of a particular file, she is in a much better position to make critical decisions as to how to proceed in a given case.

The investigator also stands to gain. Not only does he have the opportunity to work closely with the assigned prosecutor to ensure that his case is properly handled, the officer also gains valuable insight into the issues become important at trial. It is one thing for an

investigator to hear what happened to her case at trial; it is more beneficial to work with the assigned prosecutor and actually see what transpires at trial. With such experience and knowledge, the detective becomes better equipped to investigate other cases in the future.

Another major advantage of having specialized child abuse units within county prosecutors' offices is that it is ensured that cases will be handled consistently and capably. When the task is left to local officers who often lack specialized training and experience, the results are divergent and often disastrous. A child abuse unit within the county prosecutors' office also ensures that the joint investigation to be discussed below will be coordinated in a manner that cannot be achieved at the municipal level.

JOINT INVESTIGATIONS - COOPERATION BETWEEN LAW ENFORCEMENT, THE DIVISION OF CHILDREN AND YOUTH SERVICES (DCYS), AND VICTIM ASSISTANCE

Another component of an effective approach to investigating and prosecuting child abuse cases involves a good working relationship between law enforcement and the Division of Children and Youth Services. In New Hampshire, both the Division of Children and Youth Services and the county prosecutors are intimately involved in the investigation of child abuse cases. It should be noted that DCYS is not involved in all child abuse cases and consequently the following points are limited to only those situations in which DCYS does participate.

Joint investigations are essential to the success of a criminal prosecution. The need for such cooperation is readily evident when one considers what occurs when such cooperation is non-existent. In the absence of cooperation, two separate investigations are conducted. Generally, the DCYS investigation will precede the law enforcement investigation. The interview with the child may take place in a hospital or the child's home. The offender may be close at hand. A new worker may lack the training or experience to conduct an effective interview. Also, the case worker's caseload may interfere with her spending the time necessary to conduct an effective investigation from a prosecution perspective. Even with the proper training, the focus of the DCYS investigation is different than the focus of a criminal investigation, and the interview will reflect that fact. While many DCYS workers are incredibly skilled and dedicated, they are not law enforcement personnel who must be prepared to prove the case beyond a reasonable doubt.

Additionally, the DCYS worker will interview the offender. When doing so, the worker will lack the training and experience of police personnel in confronting suspects. The worker will also lack the aura of authority possessed and conveyed by law enforcement personnel. Under such conditions, the likelihood of obtaining admissions is lessened.

The police investigator will then conduct his investigation. The victim will be subjected to a second interview. It is likely that discrepancies, sometimes major, will exist between the reports of the two investigative entities. The differing reports can then be used to impeach the child when he is required to testify.

When the criminal investigation is almost complete and the time comes to interview the offender, several possibilities exist. One is that the offender may have contacted an attorney and will simply refuse to speak. The other is that the offender, having been made aware of the allegations and having had time to prepare, will give a well planned denial. He may also have had time to work with the victim so that the victim has already recanted. In any event, it is clear that the likelihood of obtaining an admission is greatly reduced.

Given that child abuse cases are so difficult to try, it is axiomatic that anything that interferes with the gathering of evidence is to be avoided. If law enforcement, victim assistance and the Division of Children and Youth Services cooperate, all parties stand much to gain. During the interview of the child, all may be present and privy to the same information. All will then benefit from the information obtained by the more experienced interviewer. It should be noted that although two separate reports will be prepared, they will be based upon the same information. A similar rationale applies to interviews with the offender. While victim assistance, and DCYS workers may not be present, the offender will be more likely to speak with the investigator than if he had already been alerted to the report of abuse. He will also be more likely to make admissions or poorly prepared denials which can be refuted at trial.

The investigator also gains from the joint investigation. It is not unusual for a DCYS or victim assistance worker to come across a piece of information of great value in the investigation and prosecution. This information may come from one of the victim's relatives or a variety of individuals who the investigator may never have interviewed or re-interviewed as the case progresses. The DCYS or victim assistance worker can also be of value in providing certain insights into how the family interacts and in providing support to the victim. Lastly, they can provide assistance in transporting and locating a child who has been removed from his home.

UTILIZATION OF ALL AVAILABLE TECHNIQUES

Many tools and techniques are available to prosecutors trying child abuse case. Some examples of these are:

1. Anatomically correct drawings
2. Videotaped interviews
3. Expert testimony
4. Multidisciplinary approaches
5. Rape Shield statutes
6. Hearsay exceptions
7. A rapidly expanding body of case law.

With the exception of the multidisciplinary approach, all of these developments can be readily utilized in court and will be discussed in detail in the following subsections under

individual headings. While not every prosecutor will choose to use these tools, it is important that he understand that they exist and how they can be used. It is incumbent upon the prosecutor to familiarize herself with them so that she can make an informed decision as to whether he wants to make them a part of his arsenal.

As for the multidisciplinary approach, it will not be treated individually. Yet, it is so significant a development that it requires some amplification here. The multidisciplinary approach is simply a team approach to handling child abuse and neglect cases. In its purest form it consists of a DCYS worker, medical professional, mental health professional, law enforcement investigator, victim assistance worker and a prosecutor. It is essentially a vertical prosecution format which includes additional personnel. Its function, however, is broader than that of a vertical prosecution format.

It operates from the initial complaint until after the criminal prosecution is complete. Some components of the team will continue to operate well after the termination of the criminal prosecution. As a group, the members are responsible for the investigation of abuse, the determination that abuse has occurred; therapeutic treatment of the victim, if necessary; protection of the victim; and the criminal prosecution. When one member takes the lead in fulfilling the function of his profession, it is expected that the others will assist in any way possible. For the prosecutor, this means that he has ready access to expert opinions, as well as expert witnesses who may be called to testify at trial. It also means that critical decisions are not made in a vacuum.

The multidisciplinary approach is one to which all prosecutors should strive to achieve. As you may have noticed, however, it is not included as an integral part of the approach previously discussed here. The reason for this is two-fold. First, it is very difficult to implement a true multidisciplinary approach in most jurisdictions. In its purest form, the members of the group would be in close contact and meet periodically to review the progress of the cases for which they are responsible. For large jurisdictions with excessively large caseloads, such an approach is not currently feasible. In smaller jurisdictions, such specialization may not be practical. In the remaining jurisdictions, financial reasons often prove to be prohibitive. At least some counties of New Hampshire have been able to find hospitals which are willing to shoulder much of this responsibility. Secondly, where specialized units are formed and the prosecutors draw upon experts in other professions on a case by case basis, such an approach is very similar to the multidisciplinary approach. The primary difference is that the burden is on the prosecutor to obtain necessary medical and mental health experts.

PRACTICAL ISSUES

ANATOMICALLY DETAILED DOLLS/DRAWINGS

Anatomically detailed dolls should rarely if ever be used. Though once thought to be a valuable tool, recent history has demonstrated severe limitations and often counterproductive consequences of the use of the dolls. Few, if any prosecutors are truly skilled in their use; the inherent suggestion of manipulation and often subjective interpretation associated with the use of the dolls renders their use risky at best. In contrast anatomically detailed drawings are less susceptible of misinterpretation and provide the added advantage of being able to serve as an exhibit at trial.

Any prosecutor involved in prosecuting child abuse cases should have a set of anatomically detailed drawings. While he may not choose to use them in all cases, they are too valuable a form of evidence to be overlooked and not used regularly. Anatomically detailed drawings achieve several different goals:

1. At the outset, they facilitate communication or understanding between the jury and the witness. Young children use a variety of words and phrases to describe their intimate parts. Some confuse phrases. Some refer to their intimate parts generically as when a six year old female says a defendant put his penis in her "private" but cannot provide any further description. When she circles the rectum on an anatomically correct drawing it leaves no doubt for the jury that she is referring to an act of sodomy. Furthermore, the jury will not be confused when they hear testimony of her age appropriate hymen and introitus with no evidence of abuse.

2. Anatomically detailed drawings allow a prosecutor to have his witness tell his or her story twice. First, the prosecutor elicits as much oral testimony as possible. Utilizing the drawings, the prosecutor then has the child repeat everything while indicating on the drawings what the child means. As any prosecutor knows, the more times a primary witness repeats his testimony to the jury, the better position the State is in to get a proper verdict.

3. Lastly, most child abuse cases have little evidence. When anatomical drawings are used the jurors will have an exhibit to take with them during deliberations. This visual aid reinforces the child's testimony in very graphic terms.

Anatomically detailed drawings should not, however, be used in all cases. Older victims of abuse may feel silly using the dolls/drawings and may also appear that way. They are usually sufficiently articulate so that the use of the anatomically detailed drawings is not necessary. Even with younger children, prosecutors should be cautioned to ascertain whether an in-court demonstration with the drawings will add to the child's credibility.

VIDEOTAPED INTERVIEWS

The use of videotaped interviews in the prosecution of child abuse cases, and especially sexual abuse cases, has proven to be one of the most effective tools available to the prosecutor. The benefits of videotaping an interview of a child victim are numerous:

- of
1. It reduces the number of repetitive interviews to which a child is subjected;
 2. It provides an accurate record not only of the child's statements but the conduct of the interview itself;
 3. It eliminates any need for the child to appear in person before the grand jury, as it allows assessment of the child's demeanor as well as the content of the child's statement;
 4. For older adolescent victims it reduces the likelihood that the victim will have to be subjected to depositions by the defense;
 5. It provides a means for children to review their statements in preparation for trial;
 6. It serves as a better tool for prosecutors to use in assessing the credibility and impact of the child's testimony on a jury, than relying on written statements alone;
 7. Occasionally, viewing the videotape will persuade the defendant and/or defense counsel to negotiate a plea rather than proceed to trial.

8. When the videotaped interview is shown to a jury it often has a much stronger impact than merely reading a statement; the most common circumstances in which the videotape has been introduced in trials include: a) as a prior consistent statement under Rule 801 (d) (1) (B) of the New Hampshire Rules of Evidence; (b) under the completeness doctrine, Rule 106 of the New Hampshire Rules of Evidence, and c) in circumstances where a portion of the statement was used for impeachment, the entire statement may be admitted under the ruling in *State v. Dean*, 129 NH 744 (1987); d) less common, but not to be overlooked are circumstances which may arise under the general exception to the hearsay rule found in Rules 803 (24) and 804 (6), New Hampshire Rules of Evidence.

Several basic procedures must be implemented to ensure the effectiveness of videotaped interviews. Having a highly skilled, trained interviewer is essential. No one who has not received specialized training in conducting such interviews should be allowed to interview a child victim. The training should go beyond mere interview techniques, and should cover issues such as victimization; child development; use of language; listening skills; etc.

The environmental setting of the interview is also important. The location should be non-threatening; e.g., not a police station or hospital emergency room. If these are the only facilities available, then some attempts should be made to ensure that the interview room itself is comfortable for children. However, the room should not be filled with toys, stuffed animals, Disney posters, etc., as these items are likely to distract the child, especially if the child is having difficulty talking about the abuse. If at all possible the video equipment should

be located outside the interview room: this is perhaps best accomplished with the use of a "two-way" mirror, although there are equally non-intrusive methods.

USE OF EXPERT WITNESSES

The use of expert witnesses is another tool which prosecutors cannot afford to ignore. At the current time, there are primarily two types of experts in child abuse cases. The first is the medical professional, able to testify as to physical evidence of abuse, has long been relied upon by prosecutors when physical evidence exists. All too often no such physical evidence exists. The newly emerging experts in child abuse cases are mental health professionals who can fill the gap when there is no physical evidence. They may testify in reference to the symptomology and behavioral patterns of abused children.

In reference to experts who testify as to physical evidence of abuse, no analysis of this type of expert testimony will be provided here due to complexity of the subject and the limited scope of this section of the manual. Other sections of this manual, however, provide a detailed understanding of such testimony. It is expected that all prosecutors are familiar with qualifying experts and eliciting their testimony.

It should be stressed, though, that expert medical testimony should be presented whenever it provides evidence of the abuse, however minimal. It should also be used when no evidence exists, but due to the nature of the abuse, a layman might expect there to be evidence of abuse. It is important not to leave juries wondering whether there should have been evidence of abuse, when in fact, an expert would not have expected to find evidence. As a tactical matter, however, you may want to allow the defense to call the medical expert and then take the expert on cross-examination. The effect of this tactic can be devastating to the defense, but it does have its own risks.

As stated previously, the newly emerging expert in child abuse cases is the mental health professional. His testimony centers around behavioral patterns of abused children and the dynamics of abuse, including its indicators. All of these areas are subsumed under or related to what are known as Child Sexual Abuse Syndrome and Post Traumatic Stress Disorder, among others.

In some states, such testimony has been used for several years and is well supported by case law, statute, or court rules. Other states have prohibited its use in its entirety. In New Hampshire no statute addresses the issue directly, nor has the New Hampshire Supreme Court confronted the issue. However, New Hampshire's historical latitude given to expert testimony and the experience at the Superior Court level suggest few problems with the admissibility of such evidence.

LEGAL ISSUES

INTRODUCTION

From a purely legal perspective, trying child abuse cases today can be an incredibly difficult task. In addition to the specialized body of case law that has developed over the years, prosecutors trying an abuse case confront perhaps one of the most rapidly expanding bodies of case law in the field of criminal prosecution. Historically, very few child abuse cases were the subject of criminal prosecution. With the increasing public awareness of the problems of child abuse in recent past, however, the number of criminal prosecutions have increased dramatically. Consequently, the appellate courts are having to deal with child abuse issues at an unprecedented rate, and as one would expect, they are handing down decisions which dramatically impact on the manner in which prosecutors discharge their responsibilities.

It is imperative that prosecutors trying child abuse cases be cognizant of the developments that are taking place at the current time as well as the case law that has developed over the years. Prosecutors well versed in other areas of criminal law cannot assume that their expertise in other areas will enable them to handle child abuse cases adequately. Prosecutors of child abuse cases are too specialized and the case law is in too great a period of flux for such a cavalier approach.

The purpose of this section of the manual is to provide an overview of the legal issues that prosecutors can expect to encounter in any given child abuse case. It is, however, not intended as a substitute for legal research on the part of the reader. The increasing number of child abuse cases and the lack of precedents in certain areas preclude a comprehensive analysis here. This part is merely intended to alert the reader to certain issues that may arise and to provide a foundation upon which legal research can begin.

It should be noted that prosecutors responsible for trying child abuse cases should not hesitate to draw upon the assistance of prosecutors in other counties and in the Attorney General's Office who are responsible for trying child abuse cases. Another valuable source of assistance is the Appellate Section of the Attorney General's Office. Deputy Attorney Generals in that section have prepared comprehensive and exhaustive briefs on many of the issues prosecutors will confront.

THE RAPE SHIELD STATUTE

New Hampshire RSA 632-A:6 contains a provision which is often referred to as the "rape shield" statute. The basic provision is straight forward:

Prior consensual activity between the victim and any person other than the actor shall not be admitted into evidence in any prosecution under this chapter.

This is a very significant statute for prosecutors trying child abuse cases. It is quite common for victims of sexual abuse, especially long-term abuse, to act out sexually in a

variety of ways. Unfortunately, it is also not unusual to discover that victims of sexual abuse have been abused by more than one individual. Whenever such information is provided in discovery, prosecutors should expect that defense attorneys will strenuously attempt to elicit that information.

Such testimony is particularly damaging to the State's case, even in the context of what otherwise would be considered a strong case. Defense attorneys like to elicit such testimony to suggest that the victim is prone to fantasy, is sexually precocious, or simply not worthy of belief. They often like to introduce such testimony for no other reason than this testimony confuses the jury or distracts their attention. While it is often stated that a confused jury is one likely to return a not guilty verdict, this is especially true in child abuse cases where the primary evidence against the defendant is the testimony of a young child.

Whenever such information is provided in discovery, prosecutors should expect the defense to focus on it in their opening and attempt to elicit testimony about it from the victim. Prosecutors should be prepared to utilize RSA 632-A:6 to prevent such a tactic by the defense. This is so even when the defense has failed to provide notice as required by the Superior Court Rule 100 A.

If the defense has not provided notice, prosecutors should wait until after the jury is drawn but before commencement of trial and by way of limine motion inform the court that the State has reason to believe that the defense may attempt to elicit testimony barred by the statute. If this is acknowledged by the defense, the following argument should be made:

1. The evidence the defendant seeks to admit is evidence of the victim's prior consensual sexual activity, and the statutory prohibition of RSA 632-A:6,II, applies as the defendant is charged with a violation under RSA 632-A.
2. The defendant failed to comply with the notice requirements under Superior Court Rule 100-A and therefore is precluded from introducing such evidence.

If the defendant has complied with the notice requirement or the court finds good cause for an untimely filing of the notice, the prosecutor must be prepared to respond aggressively on behalf of the victim to have any such evidence excluded. To do so it is essential that prosecutors be well versed in the case law concerning the rape shield law and be prepared to argue that the defendant has failed to make the required showing to warrant overriding the statute's protections. The appendix to this section contains summaries of significant case law with which every prosecutor involved in these types of cases should be familiar.

In State v. Howard, 121 NH 53 (1981), the court recognized a defendant's right to a hearing on the issue of the admissibility of evidence excluded under the provisions of the rape shield statute. Though several exceptions to the rape shield law have been created, the burden remains on the defense to demonstrate a "reasonable possibility that the information sought will produce the type of evidence that due process will require to be admitted at trial." State

v. Miskell, 122 NH 842, 846 (1982). The privacy privilege created by the rape shield law need not yield to pretrial questioning, even in a Howard hearing, where the defense has failed to make the requisite showing by way of an offer of proof. (See, State v. Baker, 127 NH 801 (1986)). An offer of proof should always be demanded by the prosecution before any victim is subjected to testifying at a Howard hearing.

CORROBORATION OF VICTIM'S TESTIMONY

New Hampshire RSA 632-A:6 Testimony and Evidence, also has a provision which provides that the "testimony of the victim shall not be required to be corroborated in prosecution under this chapter." This statutory provision should be requested as a jury instruction in every case of sexual assault, as there is often little corroboration of the child's testimony, and the defendant frequently argues the lack of corroborating evidence. It is, therefore, important to argue to the jury that the defendant's counsel's argument is contrary to the law and that the judge will in fact tell them that the law does not require such corroboration. In cases where some corroboration exists, the statute should still be argued as it makes the point that more evidence exists than is even necessary; making your case seem that much stronger.

SPEEDY TRIAL FOR CHILD VICTIMS

New Hampshire RSA 632-A:9, specifies:

In any action under this chapter involving a victim 13 years of age or under or a victim 65 years of age or older, the court and the department of justice shall take appropriate action to ensure a speedy trial to minimize the length of time the victim must endure the stress of involvement in the proceeding. In ruling on any motion or request for a delay or continuance of proceedings, the court shall consider any adverse impact the delay or continuance may have on the well-being of the victim or any witness who is 13 years of age or under or 65 years of age or older. This provision establishes a right to a speedy trial for the victim and shall not be construed as creating any additional rights for the defendant.

Prosecutors have an obligation to ensure the victim's right to a speedy trial is honored. Motions to continue filed by the defendant should generally be objected to on grounds that such a continuance would violate the victim's right to a speedy trial. At a minimum the victim should be contacted before any agreement to continue is made. Since the

statute became effective in January of 1987, more and more judges have been willing to rely on its provisions to thwart the delaying tactics of defense counsel.

STATUTE OF LIMITATIONS

In 1990 the legislature dramatically extended the statute of limitations for sexual assault offenses against minors. With an effective date of April 27, 1990, RSA 625:8, III, (d) provides that a prosecution may commence "for any offense under RSA 632-A, where the victim was under 18 years of age when the alleged offense occurred, within 22 years of the victim's eighteenth birthday." The application of this provision applies to all cases for which the previous statutes of limitation had not expired when the current statute became effective.

Accordingly, no offense occurring prior to January 1, 1981 may be prosecuted (regardless of the age of the victim at the time) because the six year statute of limitations in effect at the time would have expired on December 31, 1986.

For cases involving minors as victims which occurred between January 1, 1981 and April 26, 1984 a prosecution may not be commenced under the sexual assault statutes if the victim turned eighteen on or before April 26, 1984. However, cases occurring after January 1, 1981 involving minors who turned 18 after April 26, 1984 are subject to the extended provisions of the 1990 amendment to the statute of limitations.

Aside from the statute of limitations there have been numerous amendments to the definitions, elements and requirements within the sexual assault statutes. It is imperative that the statute in effect at the time of the offense be consulted before an indictment is written or a charging decision is made.

F. COMPETENCY @@

New Hampshire law presumes the competency of all persons to testify as witnesses in Court, unless statutes or evidence rules disqualify the individual. Rule 601 (a) of the New Hampshire Rules of Evidence provides that if the court finds that an individual "lacks sufficient capacity to observe, remember and narrate as well as understand the duty to tell the truth", that person is disqualified from testifying, on grounds of incompetency.

The New Hampshire Supreme Court, in *State v. Mills*, Slip Opinion 91-014 (decided July 27, 1992), at 3, declared that the competency of a witness is a question of fact for the court and not a jury to determine. Absent an abuse of discretion, if there is evidence to support a finding of competency, the ruling will not be overturned.

State v. mills, New Hampshire Supreme Court Slip Opinion 91-014 (decided July 27, 1992), at 3. The Court, in Mills, afforded the trial court's finding a great deal of deference, recognizing that the trial court was in a position to observe the witness in person.

There is no certain age a person must reach before being deemed competent to testify. In State v. St. John, 120 NH 61 (1980), the New Hampshire Supreme Court upheld a finding of competency for a six year old child. In the more recent case of State v. Kelly Mills supra, the Court upheld the finding of competency for a four year old testifying in an assault case. The Superior Court, after hearing voir dire conducted by the prosecutor, and engaging in discussion with the witness, found that the boy wanted to tell the truth and recognized that a failure to do so would cause his parents to be upset. The child also demonstrated to the court that he could observe and understand a variety of things. With child witnesses, as well as persons with mental disabilities, prosecutors should be aware that a competency hearing will usually be required, but this can usually be accomplished at the time the child is called as a witness and does not require a separately scheduled hearing.

The manner in which competency hearings are conducted varies greatly depending upon the judge. Some courts will allow the prosecutor to elicit the testimony necessary to establish competency. These courts may also allow the defense the opportunity to put questions to the victim. Prosecutors should be cognizant of the need to restrict the defense's cross-examination to competency only. Some defense attorneys will attempt to stray from competency into the substantive charges in order to establish a record which can be used to impeach the victim at trial.

Other courts allow neither the prosecutor nor the defense to elicit testimony directly from the victim. The court instead assumes this responsibility and usually will allow the attorneys the opportunity to submit specific questions for the court to ask, if the attorneys so request. Prosecutors should affirmatively request this opportunity and present a written list of questions to the court similar to the ones that the prosecutor would use if allowed to elicit the testimony directly. If not allowed this opportunity, prosecutors should nonetheless be ready to respectfully object to the

court's questions if put to the victim in a manner a child would not be expected to understand. Examples of inappropriate questions for very young children are:

- Do you know that you have an obligation to tell the truth?
- Why is it important that you tell the truth?
- What is the truth?
- Do you know what it means to swear to tell the truth?

Even with poorly phrased questions, some very young children give reasonably good answers. Other children, however, can give very confused answers or totally nonresponsive answers. The prosecutor should respectfully request that the questions be paraphrased in a manner that a child would be expected to understand and be prepared to provide them to the court.

If a prosecutor is allowed to elicit testimony directly, he should begin by asking questions designed to establish that the witness is capable of expressing himself. These questions should center around aspects of the child's life that are important to him. The following is a brief list of examples of general areas that should be delved into:

1. Age and other vital statistics such as address, telephone number, etc.
2. Who the witness lives with
3. Descriptions of the witness' home and living arrangements
4. The important people in the witness' life
5. Who the witness' friends are
6. What the witness likes about them
7. What the witness likes to do for fun
8. School or pre-school
9. Favorite subjects and abilities to count or spell

Within these areas, numerous questions can be promulgated. Depending upon the child's responses, they can be never ending. The purpose of these questions is merely to demonstrate that the child can respond to the questions posed.

As for the second area of significance under the rule, the

witness' understanding of his duty to tell the truth, the questions should be directed to the child to demonstrate that he understands the difference between the truth and a lie, that it is right to tell the truth, and that she will be punished in some fashion if she tells a lie. In some instances, this can be easily established.

- Have you ever heard someone tell a lie?
- Who? (Prompting may be necessary to get a child to identify someone such as a friend or sibling.)
- What did they say?
- Why was that a lie?
- Was it good or bad (or right or wrong) for them to say that?
- Is it good or bad for you to tell a lie?
- Are you supposed to lie?
- Why?
- What happens if you tell a lie?

While some of these questions may not always be productive with very young children, in many instances they will be very productive if the child is properly prepared. It should be noted, however, that there are a variety of questions which can be utilized to elicit the necessary information. Prosecutors should spend sufficient time with the victims so that they can accurately assess what type of questions will be the most effective. The investment in time in preparing the victim will be equally useful in making the victim feel more relaxed in the courtroom.

V. OTHER CONSIDERATIONS

A. THE CHILD WITNESS AT TRIAL

There is a widely held belief that victims of child abuse suffer great trauma when they take the witness stand to testify against their abuser. The basis for this belief is difficult to determine. The media regularly depicts this belief as do fictional accounts on television. To a certain extent, this may account for the popularity of the notion.

It may also be that the notion developed as a result of the fact that primarily only the worst of abuse cases in terms of the abuse and the worst of the abuse cases in terms of the prosecutor's proofs would go to trial. Consequently, the perception that children will be traumatized may be based upon what happens in only a small minority of the cases, not all cases.

It has only been within the past ten years that the criminal justice system has started to effectively respond to child abuse cases. Much of what was done or believed in the past is now outdated. As prosecutors put more child witnesses on the stand, they gain a better understanding of the dynamics involved and learn new techniques to do it more effectively and with less hardship.

As a general statement, it is simply not true to state that abused children suffer great trauma when called to testify. While it is true that some children will be unjustifiably traumatized, the vast majority of child abuse victims can testify without adverse effect. Children can be wonderful witnesses, and if handled properly, the experience need not be detrimental.

Testifying is a frightening experience for anyone, regardless of age. Many well adjusted educated, and informed adults are visibly anxious at the prospect of having to testify. Every time a new victim of child abuse enters one's office, they should be referred to the victim/witness unit in that office. Children pick up on the perceptions of those around them. If the child's parent is also a witness and is anxious, the child will react similarly.

Along a similar vein, it is the child's expectations that often determine how he or she will react. The child knows nothing about testifying except what he is told. If he is led to believe that it will be a horrifying experience, the child may well make it horrifying.

Children show their emotions much more noticeably than adults. It is not unusual for a young child to be visibly anxious or

emotionally upset at the prospect of doing many things that they periodically are required to do. For example, when a child is informed that he is going to the dentist or going to get a shot, a few tears, protestations, and stomping of the feet can be expected. When parents confront this situation, however, they do not decide to forego medical and dental treatment. Similarly we should encourage parents to recognize that proceeding is ultimately in the best interest of their child and we should help them reduce the anxiety associated with the anticipation of testifying.

It must also be recognized that child abuse trials are nothing like they are depicted on television. Defense attorneys seldom blatantly attack the child witness on the stand in the same manner as they do adult witnesses. They refrain from doing so because if the jury perceives their tactics as being unfair or as taking advantage of the child, the jury will be sympathetic to the child, the attorney will lose credibility, and the jury may well take it out on the defendant. They also refrain from doing so because there are numerous kind and considerate methods of eliciting testimony that will prove more beneficial to the defendant's case. Remember, a child who is attacked will most likely cry and not be able to give answers. Cross-examination becomes meaningless in such a situation. A child who is calm will give answers, answers which may often confuse the jurors and assist the defense's case. As in other scenarios, kids often times say the darndest things.

Generally speaking, unless the abuse is marked by violence or was extensive over a long period of time, a prosecutor will likely have a potentially good witness at least from the perspective of being able to take the stand. Even with less serious abuse, however, it is not unusual for the prosecutor to observe that a witness is just not emotionally prepared to take the stand. The prosecutor should be able to recognize this in advance and act accordingly. For the majority of cases, though, the emotional image of testifying can be largely determined by the prosecutor. The following tips may be helpful in preparing a young witness for trial. Departures from these suggestions will be appropriate depending upon the age of the victim and other factors:

1. Meet with the child at least several times before trial.
2. Develop a rapport with the child before getting down to business.

3. Portray going to court as a positive experience.
4. Fully explain who you are and what your role is.
5. Explain why the child need not be embarrassed to discuss the abuse with you, that you talk children who have had things done to them all the time.
6. Explain that you already know what happened, but you just need to know more.
7. Ensure that they know that they were a victim, that they did nothing wrong and that it was the adult who did something wrong.
8. Do not talk down to the child.
9. Do not let the victim or the victim's parent think that they have the option of determining whether the child will testify. Although they may have that option, it is helpful if they are unaware of it.
10. Strive to understand the victim's emotions, fears motivations, and experiences.
11. Know your cases well. Know what the child will say. Do not be reticent to ask hard questions.
12. Visit an empty courtroom with the child.

B. SUPERVISING INVESTIGATIONS

When supervising child abuse investigations, prosecutors must ensure that officers do not forget that it is the investigation that determines whether a prosecutor will be able to prove the case to a jury beyond a reasonable doubt. Many detectives are very cognizant of this fact and conduct superb investigations, Others are not, though, and it becomes the prosecutor's responsibility to ensure that what he needs for trial is obtained. While some officers will perceive a prosecutor's involvement and requests as interference, it must be noted that it is the prosecutor who is skilled at trial

practice, not the investigator. The following general suggestions are provided to assist prosecutors in supervising investigations.

1. The more complete an investigation, the better it will be. During the early stages of the investigation, and even sometimes up to the date of trial, it is impossible to predict what the defense strategy will be, or what will become relevant or irrelevant and what will not become relevant at trial. While this is true about other types of criminal cases, it is especially applicable to child abuse cases which depend upon evidence of a different kind. From the very inception of the criminal prosecution, then, it is necessary for the investigator to be prepared to prove every detail his investigation reveals. Nothing should be taken for granted.
2. When interviewing the victim, the interviewer should let the child tell his story. The questioner should not assume that they know what happened simply because they have been told of the abuse by the DCYS worker or the child's parent.
3. When interviewing the victim, the interviewer should not ask questions in general terms. Interviewers should ask detailed open-ended questions that allow the child to respond meaningfully. When discussing abuse of a long standing nature, a question like "what would he normally do to you" makes the child respond in a general manner - a manner which lays a foundation for extensive cross-examination on how his testimony became so embellished at trial.
4. When utilizing anatomically correct drawings, it is important that interviewers are familiar with how they should be used. Anatomically correct drawings are not to be used as a substitute for a thorough investigation. They are instead intended to be used as an aid to help the victim more accurately describe the acts of abuse. When interviewing the child, investigators should seek to elicit as much information verbally as is possible. Only after

this is done should the drawings be utilized, if necessary for clarity.

5. Investigators should be wary of letting their sympathy for the victim interfere with their investigation. While investigators should show great sensitivity when dealing with abused children, the criminal investigation requires that hard questions are not left unanswered.
6. Investigators should always obtain all information about how the abuse came to be reported, why it was reported, who was involved in the reporting chain, and who else the child may have discussed the abuse with, especially those to whom the defense has access.
7. Investigators should follow up all the details provided by the victim. Child abuse cases have little hard evidence. Consequently, the corroboration of what may seem to be inconsequential details takes on greater significance than in ordinary cases.
8. Investigators should interview every conceivable source of information, if not to find out what they do know, to find out what they do not know.
9. When interviewing potential defense witnesses, including the suspect, investigators should take detailed statements to lock them into their account. There is no exception to this, regardless of how damaging the witness' statement is to the State's case. It is more advantageous to be prepared for problems at trial than it is to await the unknown. Furthermore, statements of this kind provide the prosecutor with at least some ammunition to cross-examine the witness. Any facts which corroborate the victim's account should also be covered in detail as well as the lack of any motive for the victim to fabricate the abuse.
10. Investigators should strive to obtain a good grasp of the dynamics of the relationship between the victim and the suspect, and between the suspect and the victim's family members. If hostilities or hidden agendas exist, it is important to know about them in advance.

11. Victim assistance should maintain direct and regular contracts with the victim and victim's family throughout the course of the prosecution. Due to the relationships involved in many child abuse cases, it is not unusual for significant developments to occur.

C. CONVINCING THE JURY

While openings and closing statements in child abuse cases are generally the same as those in other types of cases, the type of evidence presented in child abuse cases requires that prosecutors make arguments of a somewhat different nature. In addition to the standard prosecutorial openings and closings, prosecutors who have not tried child abuse cases may find the addition of the following points to be of value in persuading a jury:

OPENING STATEMENTS

1. Tell the victim's story. Avoid legalese and the legal language of the indictment. Do not use phrases such as "the evidence will show", "the victim will testify"...etc.
2. Describe the events from the victim's perspective, what the victim was feeling, the details of abuse, and what specifically the defendant did.
3. Be conscious of the language and words you use. Choose your words carefully. Personalize the victim. Use the active not passive voice. Vary your tone. The jury should be reliving the victims ordeal not merely being told about it.
4. Alert the jury to possible problems, but do it in the context of describing the tragedy of the abuse or the dynamics of the abuse.
5. Elaborate the fact that they are hearing a child

abuse case and that it does not contain the type of evidence that they might expect from watching television. Describe the case in terms of a secret crime, one that happens behind closed doors. Mention types of evidence in the more routine cases and point out that as in many child abuse cases the only evidence the State has will come from the mouth of the victim. Reinforce the fact that oral testimony is as good as any other form of evidence, if not better. Have them prepared so that when they hear the testimony, they will not have unrealistic expectations.

CLOSING STATEMENTS

1. In a child abuse case, due to lack of physical evidence, it is crucial that the prosecutors demeanor and behavior before the jury clearly reflect the fact that he has no doubts whatsoever about the defendant's guilt. The jury's decision will be difficult enough without them having to wonder if the prosecutor was a little too enthusiastic about the case. It should be noted, however, that prosecutors should act in a fair, professional, and responsible manner to ensure that the jury will not have questions about the State being overzealous.
2. In reference to reasonable doubt, explain that the State is not required to prove every fact adduced at trial beyond a reasonable doubt; the State need only prove the elements of the crime beyond a reasonable doubt. Encourage the jury not to get sidetracked on minute issues. Tell them that it is okay to wonder about certain details, but ask them to focus on the major issues, the specific acts of abuse.
3. Where appropriate discuss in detail the child's inappropriate sexual knowledge. Ask how the victim could describe sexual acts of an intimate nature so effectively

if he had not been abused.

4. If there are inconsistencies in the child's account, explain that the victim is a child who has gone through something that no one should have to endure. Explain that credible adults often have trouble remembering every little detail about something that happened in the past. Ask them to consider the victim's age and emotional development, and then ask whether they would have expected him to be entirely consistent.
5. If there are no inconsistencies in the victim's account, point out that the abuse is something the victim will never forget and that the memory of it will remain with him for the rest of his life.
6. Highlight the fact that children are terrible liars and that if the child was fabricating the abuse, it would be impossible for him to have held up through all the interviews, pretrial preparations, and trial without it becoming painfully obvious. Give colorful examples of stupid lies that children tell. Point out that kids lie to get out of trouble, not into it, and that going to a police station and testifying at trial to a child is trouble.
7. If no motive is presented by the defendant for the victim to fabricate the abuse, ask the jury why the child would go through all this had it not occurred.
8. If a motive for fabrication is proffered, ask the jury to consider whether it has any merit; would the child go through all this for this reason?
9. Peculiar aspects of the evidence, such as the child's failure to report, parent's failure to report, or possible recantation of a witness, should be explained away as the dynamics of abuse.
10. In reference to the defendant's actions, instruct the jury that the State need only prove what the defendant did. Tell them that the State cannot and does not have the responsibility to explain why the defendant engaged in acts of abuse as they heard described. Remind them that

child molesting is not a rational act.

11. Remind the jury that the victim's testimony does not have to be corroborated.
12. After rebutting points of defense counsel's closing and making any specific points you deem important, close by re-telling the victim's story.